

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
The New York City Department of Education)	CC Docket No. 02-6
Request for Review of a Decision of the Universal)	
Service Administrator)	

**REQUEST FOR REVIEW OF A DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR**

Pursuant to 47 C.F.R. § 54.719(c), the New York City Department of Education (“NYCDOE”) seeks review by the Wireline Competition Bureau (“Bureau”) of the Funding Commitment Decisions issued by the Universal Services Administrative Company (“USAC”) on December 2, 2013 for the below-referenced FRNs, denying funding for Funding Years 2011 and 2012, which were issued at the same time as USAC’s December 2, 2013 Further Explanation of the Administrator’s Decision (the “December 2, 2013 Decision” (Attachment G)):

Form 471 Application Number: 821325
Billed Entity Number: 153135
Billed Entity FCC RN: 0011919750
Applicant’s Form Identifier: NYC11ISP
Funding Year 2011
Funding Request Number: 2237088

Form 471 Application Number: 875253
Billed Entity Number: 153135
Billed Entity FCC RN: 0011919750
Applicant’s Form Identifier: NYC11ISP
Funding Year 2012
Funding Request Number: 2389503

Related: (USAC has not issued CAL yet)
Form 471 Application Number: 755776
Billed Entity Number: 153135
Billed Entity FCC RN: 0011919750
Applicant's Form Identifier: NYC11ISP
Funding Year 2010
Funding Request Number: 2239569

While USAC has not yet issued a commitment adjustment letter ("CAL"), the December 2, 2013 Decision makes clear that USAC will also rescind funding for Funding Year 2010.

INTRODUCTION AND SUMMARY

In the decisions under appeal, USAC denied NYCDOE's applications for funding for Internet services for Funding Years ("FYs") 2010-2012 because NYCDOE was allegedly applying for duplicative services, which, by definition, are not the most cost effective means of obtaining service. In addition, USAC denied funding for Internet services for FY 2010 because NYCDOE allegedly filed its Form 471 prior to entering into a contract with its vendor. As described in greater detail below, NYCDOE respectfully requests that the Commission reverse USAC's decisions to deny this funding because: (1) while its Internet service plan utilized two providers to ensure load balancing and protection against service outages, the service arrangement was not duplicative in that it did not provide the same service to the same population in the same location during the same period of time; and (2) because an executed written agreement was in place between NYCDOE and its Internet service provider at the time the Form 471 was filed, the Commission should, consistent with its precedent, waive the signed contract requirement in this particular case.

**NYCDOE'S USE OF TWO INTERNET SERVICE
PROVIDERS WAS NOT DUPLICATIVE**

In the December 2, 2013 Decision, USAC states that the FY2011 and FY2012 FRNs will be denied, and the FY2010 FRN will be rescinded because NYCDOE failed to select the most cost-effective service. USAC's decision is based on its determination that NYCDOE selected two service providers to provide duplicative services. As explained below, NYCDOE utilizes two service providers to meet its capacity requirements in a cost-effective and efficient load-sharing arrangement that is consistent with the FCC's rules because it is not duplicative. USAC's December 2, 2013 decision should therefore be reversed.

NYCDOE has one of the largest Internet connected networks in the United States, public or private. The network provides service to 1,200 buildings and 1,700 unique schools, reaching 1.1 million students and more than 80,000 teachers. Over time, NYCDOE's capacity requirements have expanded rapidly in order to provide sufficient connectivity for online learning, state testing and assessment, and internet based programs for over 1.1 million students. Addressing the ever-growing bandwidth demands is a challenge for even the largest Internet service providers. The providers that NYCDOE has utilized in the past have lacked the ability to reliably provide sufficient capacity that meets the NYCDOE's needs. Providers tend to oversubscribe their networks leading to bottlenecks during peak periods. In order to address these challenges in an efficient and cost-effective manner, particularly in light of the reality that NYCDOE's capacity requirements will only continue to increase over time, NYCDOE's Division of Instruction and Information Technology (DIIT) determined that the most cost-effective way to obtain internet service that meets the NYCDOE's needs was to select two Internet service providers and utilize a load sharing solution. Accordingly, NYCDOE solicited and selected two service providers to provide internet access. TW Telecom and Sidera were the

two lowest bidders. (Sidera's bid was the lowest and TW Telecom's bid was the second lowest.).

Under the load sharing solution, there is no point at which the services provided by the two Internet service providers are duplicative. Each service provider has its own network entry point and serves specific, different schools and/or administrative nodes on a given day. (See Attachments A and B). The network is configured so that the service provider may serve different schools on different days, but there is no duplication of services or redundant service to particular schools. Both providers' routes are utilized at 80% capacity every day. All school traffic egresses the DOE from one of three statically defined locations. At each location, traffic can egress the DOE using either ISP, based upon traffic and load conditions at the time. Coming back into the DOE, traffic is managed by access control lists on firewalls and switches so that both service providers have balanced traffic patterns. The enclosed network diagrams (see Attachments A and B) depict how the bandwidth requirements are split dynamically between the two selected vendors. This mechanism balances traffic and load conditions, and thereby reduces the likelihood that one service provider's bottlenecks will affect NYCDOE's internet access.

The primary reason NYCDOE decided to use a load sharing solution was because it could not obtain sufficiently reliable, consistent service from one provider. NYCDOE's experience after the 2001 attack on the World Trade Center, which brought down the school district's sole provider of Internet access, also highlights the need for two vendors. While NYCDOE utilizes both service providers each day at 80% capacity, the advantage of two Internet service providers is that, if one provider's network is capacity constrained or not functioning at all, NYCDOE can use the second provider's network to continue serving all schools. While this might result in degraded, slower service if one provider has a complete

outage, it prevents a school from experiencing a complete blackout of service until the provider is able to bring its network back into service. NYCDOE's experience during Hurricane Sandy in 2012 reemphasized the importance of having two service providers. When one of the two provider's network failed, NYCDOE was able to utilize the second provider for all schools until the first provider was able to bring its network back into service.

In the December 2, 2013 Decision, USAC cites the FCC's *Macomb Order* as the basis for its decision. In the *Macomb Order*, the FCC stated that because "price should be the primary factor considered when determining which service offering is most cost-effective, . . . requests for duplicative services, described as *services that provide the same functionality for the same population in the same location for the same period of time*, will be rejected." *In the Matter of Requests for Review by Macomb Intermediate Sch. Dist. Tech. Consortium*, CC Docket No. 02-6, Order, FCC 07-64, 22 FCC Rcd 8771, 8774 ¶ 3 (2007) (*Macomb Order*) (emphasis added).

The NYCDOE has not violated the FCC's rules or the *Macomb Order* because it has not sought funding for duplicative services. At no time do both service providers serve the same location simultaneously or carry traffic from the same location simultaneously. The percentage of total DOE locations served by one service provider may vary from one time period to the next as schools are assigned dynamically to one or the other service provider based on total traffic volume, but all locations are served exclusively by a single service provider at any point in time. Each service provider maintains its own separate facility connecting to DOE's network and traffic from an individual school is transmitted over only one of those connections at any point in time.

In the December 2, 2013 Decision, USAC also faults NYC DOE for not providing any evidence to show that Sidera was unable to provide NYC DOE with all of the required Internet

access services at the lower rate. As discussed above, NYC DOE determined that having only one service provider would not satisfy its needs and that the most efficient and cost-effective method to meet its needs reliably was to select two service providers under a load-sharing arrangement

Selecting two non-duplicative service providers in order to create a resilient and load-balanced data network for NYC's schools is therefore entirely consistent with the command of Rule 54.511(a), which states that "In determining which service offering is the most cost-effective, entities may consider relevant factors other than the pre-discount prices submitted by providers, but price should be the primary factor considered." In particular, NYC DOE selected the two lowest priced service providers to operate in a load sharing arrangement because one provider cannot reliably meet the full and growing needs of the largest school district in the country. Load sharing is a cost effective way to fully meet the increasing mission critical educational requirements for our students that also fully complies with the FCC's rules and the *Macomb Order*.

NYCDOE does not concede that the services at issue were duplicative, or that they were not the most cost-effective; however, if the FCC upholds USAC's determination, it should approve the FY2011 and 2012 FRNS at the rate provided by Sidera and recoup only the difference between the rate provided by Sidera and that provided by TW Telecom for the FY2010 FRN. In the *Macomb Order*, the FCC found that where services were not the most cost-effective because they are duplicative, but remained eligible services, the applicant is entitled to E-rate funding at a rate associated with the least expensive of the duplicative services. *See Macomb Order* at ¶9. In the December 2, 2013 Decision, USAC states that it cannot fund TW Telecom's FRNs at Sidera's lower rate because it is not the rate in TW Telecom's bid or the rate

that TW Telecom charged NYCDOE. This is contrary to the *Macomb Order*, in which the FCC explicitly stated that the school district could receive funding “at a rate associated with the least expensive of the duplicative services.” *Macomb Order* at ¶ 9.

**NYCDOE HAD A WRITTEN AGREEMENT IN PLACE WITH TW TELECOM
WHEN THE FORM 471 WAS FILED**

In the December 2, 2013 Decision, USAC states that it also intends to rescind the commitment for FY 2010 FRN 2239569 because NYCDOE did not demonstrate that it had a legally binding agreement with TW Telecom at the time NYCDOE submitted the FCC Form 471 on February 8 2010. USAC appears to make this determination on the grounds that NYCDOE failed to provide: (1) a signed, executed contract with TW Telecom; and/or (2) a document evidencing that NYCDOE conveyed its acceptance of TW Telecom’s bid to TW Telecom. With respect to the first, USAC misunderstands what constitutes the contract in the context of this procurement. With respect to the second, NYCDOE includes with this appeal a copy of the February 3, 2010 notification that was provided to TW Telecom accepting the bid (Attachment C).

The detailed sequence of procurement events is as follows. The NYCDOE utilized a Request for Bid (RFB) procurement for the solicitation. NYCDOE provided USAC with the RFB, which was issued on December 8, 2009 and set January 5, 2010 as the deadline for responses from bidders, and the Request for Authorization signed by Chancellor Joel Klein on February 2, 2010, accepting TW Telecom’s bid and granting approval to contract with TW Telecom (Attachments D and E). On February 3, 2010, NYCDOE notified TW Telecom that its bid was accepted (Attachment C). NYCDOE submitted its Form 471 on February 8, 2010. The December 2, 2013 Decision faults NYCDOE for not providing USAC with a copy of an

executed contract and for not providing a document evidencing that NYCDOE conveyed its acceptance to TW Telecom. The contract, however, is evidenced by three separate documents: (1) the RFB, setting forth the binding terms of the bid; (2) the Chancellor's February 2, 2010 acceptance of the bid through the Request for authorization; and (3) the February 3, 2010 notification to TW Telecom of acceptance of TW Telecom's bid. The first two were provided to USAC; the third is provided with this appeal because NYCDOE was unable to retrieve it previously.

Prior to a change in the Education Law that became effective July 1, 2009, the Chancellor's approval of the Request for Authorization resulted in an executed and legally binding contract; responses to the RFB are binding and the Chancellor's approval of the Request for Authorization awarded the contract to the selected bidder. NYCDOE's practice was to submit its Form 471 after the Chancellor approved the Request for Authorization within the filing window set by USAC. In 2009, however, the New York State Legislature amended the Education Law to make contract registration with the Comptroller of the City of New York (the "Comptroller") mandatory for NYCDOE. *See* N.Y Education Law § 2590-h(36)(d). That change became effective as of July 1, 2009. Pursuant to N.Y Education Law § 2590-h(36)(a), NYCDOE was required to develop rules to implement the new Education Law provisions, including the requirement of registration with the Comptroller. NYCDOE's Procurement Rules were finalized and approved by the Panel for Education Policy ("PEP") on January 26, 2010. Prior to that date, NYCDOE promulgated a Temporary Procurement Policy, which was also approved by the PEP. *See* Minutes of Action, November 12, 2009 Public Meeting of the Panel for Education Policy at Item C and January 26, 2010 Public Meeting of the Panel for Education Policy at Item D (Attachment F). Thus, the 2009 fiscal year was a transition year for NYCDOE

with respect to its procurement process. The RFB at issue here was issued and awarded during this transition year. NYCDOE submitted the Form 471 for FRN 2239569 shortly after the Chancellor's approval of the Request for Authorization, as it had done in prior years, in order to submit its Form 471 within the filing window, which for FY 2010 was February 19, 2010, even though it had not yet registered the contract with the Comptroller, as the change in the Education Law required. Had NYCDOE waited until after the contract was registered with the Comptroller it would have missed the filing window. However, when NYCDOE submitted the Form 471, it had a executed written agreement—the Chancellor's approval of the Request for Authorization awarded the contract to TW Telecom and NYCDOE had notified TW Telecom of NYCDOE's acceptance of its bid.

NYCDOE does not dispute that the contract was not registered with the Comptroller until after NYCDOE submitted the Form 471 or that the statutory change required such registration.¹ However, under these circumstances, where NYCDOE acted consistent with its prior practices while it transitioned to new practices to comply with the amended Education Law, NYCDOE urges the FCC to find that NYCDOE complied with the FCC's rules that applicants submit the Form 471 "upon signing a contract for eligible services." In the past, the Commission has consistently and wisely waived the formalities of the executed contract requirement when school districts "had legally binding agreements in place prior to the filing of their FCC Forms 471."

Requests for Review or Waiver of Decisions of the Universal Service Administrator by

Amphitheater Unified School District 10, Tucson, Arizona, CC Docket No. 02-6 (Order), 28 FCC

Rcd 7536, ¶ 2 (2013). Accordingly, NYDOE requests that the Commission find that such a

¹ NYCDOE submitted the contract to the Comptroller for registration on August 3, 2010 and it was registered on October 20, 2010. The Comptroller initially rejected the contract on August 31, 2010, but registered the contract on October 20, 2010 after NYCDOE resubmitted it on September 29, 2010. The contract was registered with a contract start date of July 1, 2010.

waiver is justified in this case. Such a finding would also be consistent with the FCC's guidance that "rigid adherence to certain E-rate rules and requirements that are 'procedural' in nature does not promote the goals of section 254 of the [Communications Act of 1934] – ensuring access to discounted telecommunications and information services to schools and libraries – and therefore, does not serve the public interest." *In the Matter of Request for Waiver of the Decision by the Universal Service Administrator by Barberton City School District*, CC Docket No. 02-6, Order, 23 FCC Rcd 15526 at ¶ 7 (2008). *See also Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, et al*, File Nos. SLD-487170, *et al.*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316 at ¶¶ 2, 9 (2006)

CONCLUSION

For all the reasons stated, the FCC should reverse USAC's December 2, 2013 Decision.

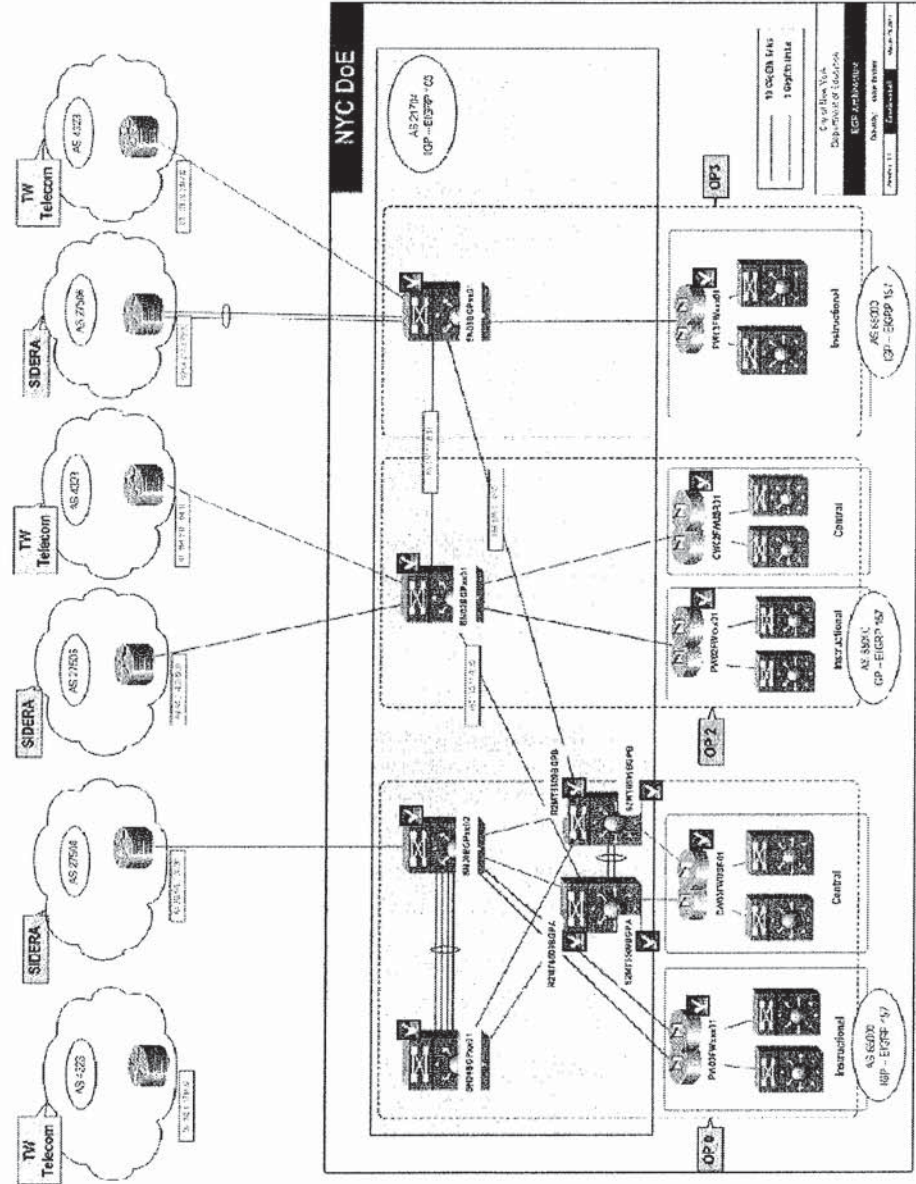
Respectfully Submitted,

JEFFREY D. FRIEDLANDER
Acting Corporation Counsel of the
City of New York
100 Church Street, Room 20-83
New York, New York 10007
(212) 356-2273

By: /s/ Sabita Krishnan
Sabita Krishnan
Assistant Corporation Counsel

January 31, 2014

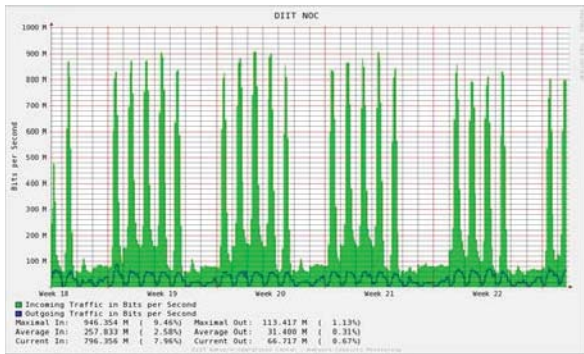
ATTACHMENT A



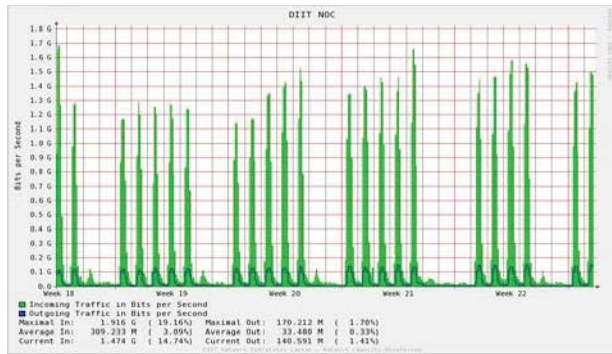
ATTACHMENT B

May 2013

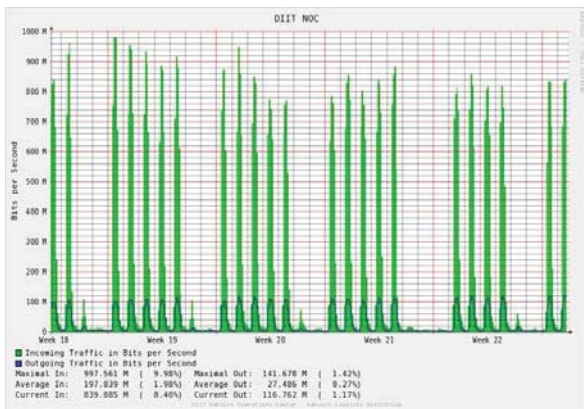
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tengigabitethernet4/9 - OP-0 GigEth(2.0 Gbps) to SIDERA cct# 16/LUXY/000032/OED



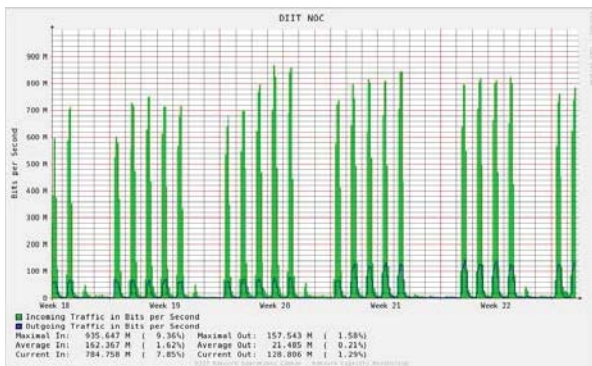
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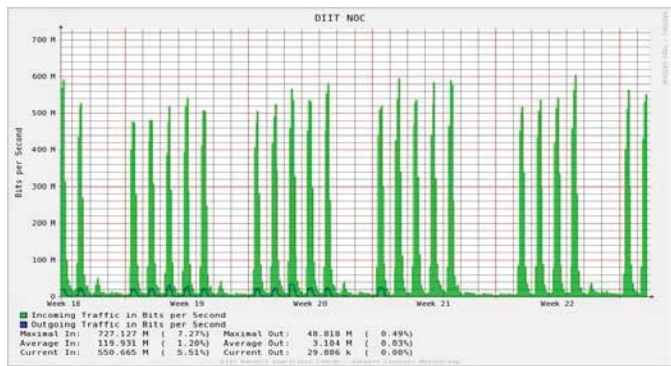
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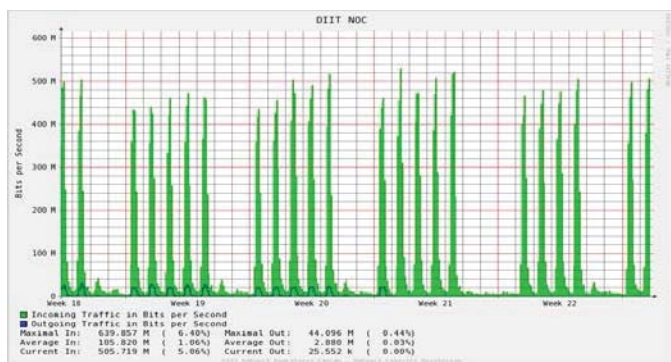
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gigabitethernet3/23 - OP-3 GigEth(1 Gbps) to SIDERA cct# 12/HMSZ/000032/OED

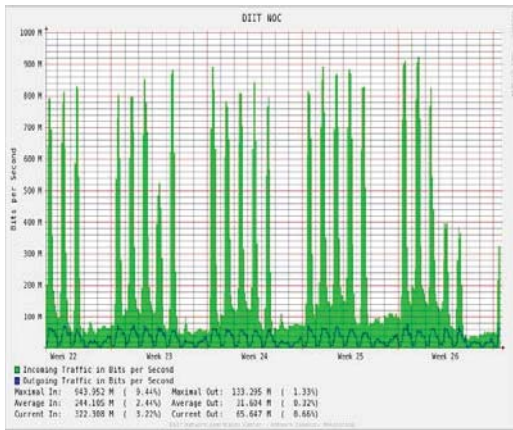


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June 2013

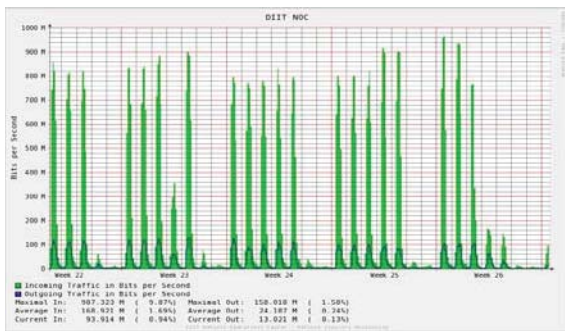
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tengigabitethernet4/9 - OP-0 GigEth(2.0 Gbps) to SIDERA cct# 16/LUXY/000032/OED



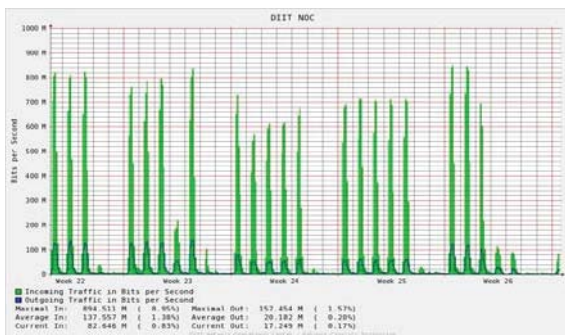
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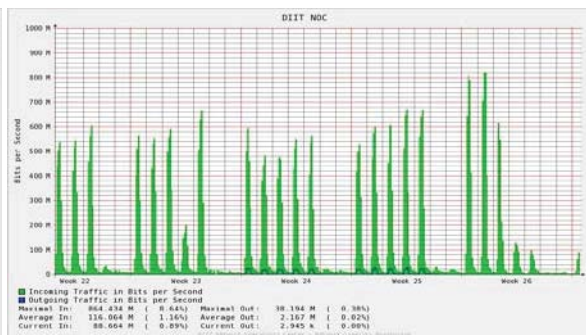
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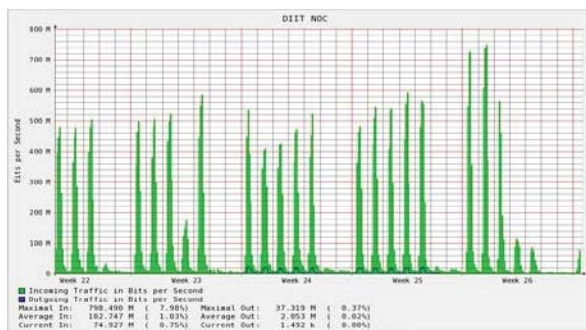
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gigabitethernet3/23 - OP-3 GigEth(1 Gbps) to SIDERA cct# 12/HMSZ/000032/OED



ATTACHMENT C

65 Court Street, 12th Floor
Brooklyn, New York 11201



David N. Ross
Executive Director
Contracts and Purchasing

Jason Henry
Chief Administrator
School Based Procurement

NOTICE OF AWARD

<u>To:</u>	TW Telecom Inc.
<u>RFB #:</u>	B1389
<u>Title:</u>	Internet Service Provider
<u>Date:</u>	February 3, 2010

This is a notice of Award to **TW Telecom** for the above-referenced solicitation. Receipt of this notice confirms that your proposal was selected for award by The New York City Department of Education (NYCDOE). The NYCDOE will be preparing a contract with **TW Telecom** subject to a satisfactory report on a background check. Since this is still an ongoing procurement, please keep this information confidential within your company until a contract is registered with the NYC Comptroller.

Please take a moment to update your company's profile at <https://vendorportal.nycenet.edu/vendorportal/login.aspx> to ensure that you continue to receive future solicitations. Also, feel free to check the DOE website at <http://schools.nyc.gov/Offices/DCP/Vendor/RequestsforProposals/Default.htm> for active solicitations that can be downloaded.

Respectfully,

Jason Henry
Chief Administrator of Purchasing Operations

ATTACHMENT D

THE NEW YORK CITY DEPARTMENT OF EDUCATION
JOEL I. KLEIN, *Chancellor*



REQUEST FOR BID
No. B1389
Title: Internet Service Provider

Sealed bids should be sent to
NYC Department of Education, 65 Court Street, Room 1201,
Brooklyn, New York 11201, Attn: Bid Unit/ Vendor Resources

DUE: 5:00 P.M. Eastern On: January 5, 2010

BIDS MUST BE RECEIVED NO LATER THAN THE ABOVE DUE DATE AND TIME

PRE-BID CONFERENCE WILL BE HELD ON:
December 15, 2009 at 8:30 AM
Location: 131 Livingston Street, Brooklyn, NY, Room 610

Please bring a copy of the RFB with you to the Conference.

FOR ADDITIONAL PROCUREMENT INFORMATION SEE OUR WEBSITE:

<http://schools.nyc.gov/dcp>

This Request for Bid is issued by
Division of Contracts and Purchasing
65 Court Street, Brooklyn, NY 11201

Vendor Hotline (718) 935-2300

**EACH ENVELOPE SUBMITTED MUST BE LABELED AND EVERY
LABEL MUST REFERENCE THE RFB NUMBER**

ATTACHMENT E



**Department of
Education**



Division of Contracts & Purchasing

REQUESTS FOR AUTHORIZATION

When your review is complete, type your password (if you are new to the system, or no longer remember your password, Click the "Remind/Get New Password" button and you will receive an e-mail with instructions) and then click on the "Approve" button.

Document Text	Backup Documentation	<u>Instructions</u>
		<u>Email Procurement for assistance</u>

Request for Authorization
- RFB B1389 ISP FINAL

Title	Internet Service Provider Services RFB# 1389
Tracking Number	1545
District	49 - Div. of Instructional & Information Technology
Document Type	Request for Authorization
Authorization	RFB
Type of Purchase	Commodity

APPROVED BY	APPROVAL DATE	PASSWORD
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Chancellor Approval Chancellor	2/2/2010 8:34:11 AM	<i>Approved</i>
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Francisco Melendez Contract Compliance Officer (OEO)	2/3/2010 6:41:17 AM	<i>Approved</i>
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Jeffrey Shear For Kathleen Grimm Deputy Chancellor for Infrastructure and Portfolio Planning	2/2/2010 2:31:38 PM	<i>Approved</i>
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Michael Best General Counsel to the	2/1/2010 3:45:37 PM	<i>Approved</i>
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Chancellor

Ling Tan
*Executive Director, Budget
and Financial Planning*

Information only

Ted Brodheim
*Chief Information Officer,
Division of Instructional and
Information Technology*

1/29/2010 12:54:59
PM

Approved

David Ross
*Executive Director, Division
of Contracts and Purchasing*

1/28/2010 3:03:19
PM

Approved

ATTACHMENT F



THE NEW YORK CITY DEPARTMENT OF EDUCATION

JOEL I. KLEIN, *Chancellor*

PANEL FOR EDUCATION POLICY
52 Chambers Street – NY, NY 10007

Attachment F

MINUTES OF ACTION

PUBLIC MEETING OF THE PANEL FOR EDUCATIONAL POLICY

Brooklyn Technical High School
29 Fort Greene Place
Brooklyn, NY 11217
January 26, 2010
6:00 pm

ROLL CALL:

Present:

Hon. Philip Berry
Hon. Linda Lausell Bryant
Hon. Joe Chan
Hon. David Chang
Hon. Joan Correale
Hon. Dmytro Fedkowskyj
Hon. Tino Hernandez
Hon. Tomas Morales
Hon. Gbubemi Okotieuro
Hon. Gitte Peng
Hon. Anna Santos
Hon. Patrick Sullivan
Hon. James Whelan
Joel I. Klein, *Chancellor*
Michael Best, *Secretary*

Absent and Excused:

Tammy Tram, *Student Member*
Joshua Varela, *Student Member*

Action was taken as indicated below:

Secretary Michael Best called the roll. All present except for Panel Member Tomas Morales.

Approval of October 7, 2009 Panel Meeting Minutes of Action—*Motion to adopt the minutes of action from the December 17, 2009 Panel meeting was made by Chairman David Chang, and seconded by Panel Member Dmytro Fedkowskyj. The minutes were approved unanimously. (Minutes attached via link to the Panel for Educational Policy website).*

- A. Chancellor's Update—*Presentation by Chancellor Joel I. Klein on the proposed phase-outs under consideration by the panel. No action was taken.*
- B. Approval of Proposals for Significant Change in School Utilization—*The Panel heard public comment on the proposals for significant changes in school utilization. Panel Member Tomas Morales joined the meeting during public comment. During Public comment, Panel Member*

PANEL FOR EDUCATION POLICY • 52 CHAMBERS STREET • NY, NY 10007

Telephone: (212) 374-5038 • Fax: (212) 374-5588

Hon. David C. Chang, Chairman, Hon. Philip A. Berry, Vice Chairman, Hon. Linda Lausell Bryant, Hon. Joe Chan, Hon. Joan Correale, Staten Island,
Hon. Dmytro Fedkowskyj, Queens, Hon. Tino Hernandez, Hon. Tomas Morales, Hon. Gbubemi Okotieuro, Brooklyn, Hon. Gitte Peng, Hon. Anna
Santos, Bronx, Hon. Patrick Sullivan, Manhattan, Hon. James Whelan



THE NEW YORK CITY DEPARTMENT OF EDUCATION

JOEL I. KLEIN, *Chancellor*

PANEL FOR EDUCATION POLICY

52 Chambers Street – NY, NY 10007

Gbubemi Okotieuro made a motion to table all proposals on the agenda for Panel consideration. The motion was seconded by Panel Member Patrick Sullivan. The motion to table was defeated by a vote of 8-5 (nay: Berry, Bryant, Chan, Chang, Hernandez, Morales, Peng, Whelan, yea: Correale, Fedkowskyj, Okotieuro, Santos, Sullivan). Following this vote, public comment continued. Following public comment, Panel Member Philip Berry made a motion to approve the resolutions for each of the 32 proposals for significant changes in school utilization. The motion was seconded by Panel Member Tino Hernandez. The Chair called for a vote on each resolution. (Resolutions for each proposal attached via link to the Panel for Educational Policy website). Panel Member Linda Lausell Bryant recused herself from the votes on resolutions related to New Day Academy and Pave Academy. The resolutions were approved as follows:

1. Resolution Regarding Approval of the Proposed Grade Reconfiguration of P.S. 11X was approved unanimously.
2. Resolution Regarding Approval of the Proposed Grade Reconfiguration of I.S. 22X was approved unanimously.
3. Resolution Regarding Approval of the Proposed Grade Reconfiguration of P.S. 114X was approved unanimously.
4. The Resolution Regarding Approval of the Proposed Grade Reconfigurations of P.S. 195X and P.S. 196X and Phase-out of P.S. 197X and Consolidation with P.S. 195X and 196X was approved unanimously.
5. The Resolution Regarding Approval of the Proposed Re-Siting of P.S. 204X was approved unanimously.
6. The Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of New Day Academy and Co-location of Dr. Izquierdo Health and Sciences Charter School with Existing Schools in School Building X158 was approved by a vote of 8-4 with one recusal (yea: Berry, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan; nay: Fedkowskyj, Okotieuro, Santos, Sullivan; recused: Bryant).
7. The Resolution Regarding Approval of the Proposed Co-location of a New School, 10X363, with M.S. 399X and East Fordham Academy in School Building X115 was approved unanimously.
8. Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of Christopher Columbus High School and Co-location of Knowledge and Power Preparatory Academy International High School with Existing Schools in School Building X415 was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan; nay: Fedkowskyj, Okotieuro, Santos, Sullivan).
9. Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of The School for Community Research and Learning and Co-location of a New School, 08X432, with Existing Schools in School Building X450 was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan; nay: Fedkowskyj, Okotieuro, Santos, Sullivan).
10. Resolution Regarding Approval of the Proposed Grade Truncation of Frederick Douglass Academy III Secondary School was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).
11. Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of Global Enterprise High School and Co-location of Knowledge and Power Preparatory Academy International High School with Existing Schools in School Building X415 was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).
12. The Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of Monroe Academy for Business/Law was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).

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13. *Resolution Regarding Approval of the Proposed Grade Reconfigurations of New School #1 @ P.S. 60 and New School # 2 @ P.S. 60 was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).*
14. *Resolution Regarding Approval of the Proposed Temporary Co-location of a New School, 20K264, with P.S. 185K and P.S./I.S. 104K in School Building K989 and Eventual Re-Siting of 20K264 to School Building K264 was approved unanimously.*
15. *Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of P.S. 332 Charles H. Houston (23K332) and Co- location of a New School, 23K747, and Collegiate Charter School in School Building K332 was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).*
16. *Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of Middle School for Academic and Social Excellence was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).*
17. *Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of Metropolitan Corporate Academy was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).*
18. *Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of Paul Robeson High School was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).*
19. *Resolution Regarding Approval of the Proposed Extended Co-location of a PAVE Academy Charter School and P.S. 15K in School Building K015 was approved by a vote of 8-4 with one recusal (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan, recused: Bryant).*
20. *Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of W. H. Maxwell Career and Technical Education High School and Co-location of a New School, 19K751, with Existing Schools in School Building K660 was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).*
21. *Resolution Regarding Approval of the Proposed Co-location of a New School, 23K671, with P.S./I.S. 323 and 75K140 in School Building K263 was approved unanimously.*
22. *Resolution Regarding Approval of the Proposed Co-location of a New School, 17K770, with P.S. 398 in School Building K398 was approved unanimously.*

Panel Member Sullivan requested a roll call vote by Panel Member on each of the resolutions for items 23-27 and a roll call vote on each of those items was taken.

23. *Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of KAPPA II was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).*
24. *Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of Academy of Collaborative Education was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).*
25. *Resolution Regarding Approval of the Proposed Grade Truncation of Choir Academy of Harlem and Co-location of a New School, 05M436, with Existing Schools in School Building M501 was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).*

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26. Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of Academy of Environmental Science High School and Co-location of Renaissance Charter High School for Innovation with Existing Schools in School Building M099 was approved by a vote of 9-3 with one abstention (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Okotieuro, Santos, Sullivan; abstention: Fedkowskyj).
 27. Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of Norman Thomas High School and Siting of Two New Schools, 02M427 and 02M432, in School Building M620 was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).
 28. Resolution Regarding Approval of the Proposed Re-Siting of Greenwich Village Middle School was approved unanimously.
 29. Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of Beach Channel High School and Co-location of a New School, 27Q324, with Existing Schools in School Building Q410 was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).
 30. Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of Business, Computer Applications, and Entrepreneurship High School and Co-location of a New School, 29Q326, with Existing Schools in School Building Q490 was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).
 31. Resolution Regarding Approval of the Proposed Phase-out and Eventual Closure of Jamaica High School and Siting of Two New Schools, 28Q325 and 28Q328, with Existing Schools in School Building Q470 was approved by a vote of 9-4 (yea: Berry, Bryant, Chan, Chang, Correale, Hernandez, Morales, Peng, Whelan, nay: Fedkowskyj, Okotieuro, Santos, Sullivan).
 32. Resolution Regarding Approval of the Proposed Co-location of a New School, 31R071, with P.S. 16R in School Building R831 was approved by a vote of 12-0 with one abstention (yea: Berry, Bryant, Chan, Chang, Correale, Fedkowskyj, Hernandez, Morales, Okotieuro, Peng, Santos, Whelan; abstention: Sullivan).
- C. Approval of Chancellor's Regulations—Panel Member Gbubemi Okotieuro moved to postpone the vote on the Chancellor's Regulations on the Panel's agenda to a special panel meeting on February 10, 2010. The motion was seconded by Vice Chair Philip Berry. The motion passed unanimously. (Regulations for each proposal attached via link to the Panel for Educational Policy website).
-  D. Approval of Final Procurement Policy—Presentation by Chief Operating Officer Photeine Anagnostopoulos and Executive Director of Contracts and Purchasing David Ross on the Department of Education Final Procurement Policy. No members of the public commented on the Final Procurement Policy. Following panel discussion, Vice Chair Philip Berry motioned to approve the final procurement policy. Panel Member Dmytro Fedkowskyj seconded the motion. The motion passed unanimously. (Procurement Policy is attached via link to the Panel for Educational Policy website).
- E. Approval of Contracts—The Contracts Committee Chairman Tino Hernandez presented a report of the Contracts Committee meeting, reporting that the Department had withdrawn contract item 17 from the agenda, and that the Committee recommended all items except for item 6 be passed without further discussion, but that item 6 be approved on the condition that the DOE complete internal DOE approvals. No members of the public commented on the contract items. Panel Member Joe Chan made a motion to approve all contract items other than item 6, and to approve item 6 subject to the above-noted condition. Panel Member Joan Correale seconded the motion.

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The motion passed unanimously. (Contracts are attached via link to the Panel for Educational Policy website).

- F. Public Comments on Other Topics—Chairman Chang concluded the meeting without further public comment on other topics.

The meeting adjourned at 3:32 AM.

A full recording of the meeting is available [here](#).

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Attachment
F

MINUTES OF ACTION

PUBLIC MEETING OF THE PANEL FOR EDUCATION POLICY

P.S. 128 Juniper Valley School

69-26 65th Drive

Middle Village, NY 11379

Queens County

November 12, 2009

6:00 pm

ROLL CALL:

Present:

Hon. Philip Berry
Hon. Linda Lausell Bryant
Hon. Joe Chan
Hon. David Chang
Hon. Joan Correale
Hon. Dmytro Fedkowskyj
Hon. Tino Hernandez
Hon. Richard Menschel
Hon. Tomas Morales
Hon. Gbubemi Okotieuro
Hon. Gitte Peng
Hon. Anna Santos
Hon. Patrick Sullivan
Joel I. Klein, *Chancellor*
Michael Best, *Secretary*
Tammy Tram, *Student Member*
Joshua Varela, *Student Member*

Absent and Excused:

Hon. Joan Correale

Action was taken as indicated below:

Secretary Michael Best called the roll. All present except for Panel Member Joan Correale, Panel Member Gbubemi Okotieuro, Panel Member Gitte Peng and Panel Member Anna Santos.

Approval of October 7, 2009 Panel Meeting Minutes of Action—*Motion to adopt the minutes of action from the October 7, 2009 Panel meeting was made by Chairman David Chang, and seconded by Vice Chairman Philip Berry. The minutes were adopted by 8-0 with 1 abstention as follows (abstention: Fedkowskyj).*

Following roll call, Panel Member Anna Santos joined the meeting.

- A. Chancellor's Update—*Presentation by Chancellor Joel I. Klein on the social promotion policy proposal for grades four and six, the H1N1 vaccination program, The School of One project and remarks about Panel Member Richard Menschel, followed by farewell remarks given by Panel*

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Member Richard Menschel. No action was taken. ([Presentation](#) attached via link to the [Panel for Educational Policy website](#)).

Panel Member Gbubemi Okotieuro joined the meeting.

- B. Approval of Fashion Institute of Technology (FIT) Board Members—*Presentation by FIT General Counsel Jeffrey Slonim on candidates being considered by the Panel for appointment and reappointment to the FIT board. Motion to approve the resolution to appoint the board member candidates was made by Panel Member Tomas Morales, and seconded by Panel Member Tino Hernandez. The resolution was adopted unanimously. ([Resolution](#) attached via link to the [Panel for Educational Policy website](#))*

- C. Approval of the Extension of the Emergency Adoption of the Temporary Procurement Policy—*Presentation by Executive Director of Contracts and Purchasing David Ross on extending the emergency adoption of the temporary procurement policy for 60 days, followed by questions and comments from Panel Members. Motion to approve the resolution to extend the emergency adoption of the temporary procurement policy was made by Panel Member Richard Menschel, and seconded by Panel Member Tino Hernandez. The resolution was adopted unanimously. ([Temporary procurement policy](#) and [resolution](#) attached via link to the [Panel for Educational Policy website](#))*

Panel Member Gitte Peng joined the meeting.

- D. Approval of Contracts—*Presentation by Chief Operating Officer Photeine Anagnostopoulos and Executive Director of Contracts and purchasing David Ross on contracts being considered by the Panel. Motion to adopt a resolution approving all contracts on the agenda made by Panel Member Richard Menschel, seconded by Panel Member Dmytro Fedkowskyj. Contracts Committee Chair Tino Hernandez gave a report of the Contracts Committee meeting and reported that the Committee recommended that all items except items 12, 22, and 28 be passed without further discussion, but that items 12, 22, and 28 be discussed further before a vote. Panel Member Fedkowskyj made a motion to postpone voting on the contract with Touro College contained in item 12 until the next Panel meeting, and the motion was seconded by Panel Member Sullivan. Chairman Chang directed that discussion and vote on the motion to postpone would take place after discussion of item 12. Panel Member Santos requested that items 4, 5, 11, 13, 14, 15, 23, 24, 27, 28 be voted on separately. Following discussion of items 4, 5, 11, 13, 14, 15, 23, 24, 27, 28, Chairman Chang called for a vote on those items, and they were approved by a vote of 11-1 (yea: Berry, Bryant, Chan, Chang, Fedkowskyj, Hernandez, Menschel, Morales, Okotieuro, Peng, Sullivan; nay: Santos). Chairman Chang then called for a vote on all remaining contracts on the agenda except for items 12, 22 and 28. All remaining contracts except items 12, 22, and 28 were approved unanimously. There was then discussion of the motion to postpone a vote on the Touro College contract. Panel Members Morales, Berry, and Okotieuro recused themselves from any discussion or vote on the motion to postpone and on item 12. Following discussion, the motion to postpone was defeated by a vote of 7-2 (yea: Fedkowskyj, Sullivan; nay: Bryant, Chan, Chang, Hernandez, Menschel, Peng, Santos; recused: Berry, Morales, Okotieuro). Item 12 was then approved by a vote of 9-0 (recused: Berry, Morales, Okotieuro). Following discussion of item 22, item 22 was approved by a vote of 9-3 (yea: Berry, Chan, Chang, Fedkowskyj, Hernandez, Menschel, Morales, Okotieuro, Peng; nay: Bryant, Santos, Sullivan). Following discussion of item 28, item 28 was approved by a vote of 10-2 (yea: Berry, Bryant, Chan, Chang, Fedkowskyj, Hernandez, Menschel, Morales, Okotieuro, Peng; nay: Santos, Sullivan). ([Resolution](#) and [contracts](#) attached via link to the [Panel for Educational Policy website](#)).*

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- E. Approval of Proposals for Significant Changes in School Utilization—*Presentation by Deputy Chancellor Kathleen Grimm on proposals for changes in grade reconfigurations at PS 046M Arthur Tappan and at Mott Hall V. Motion to adopt resolutions to approve the proposals was made by Panel Member Gbubemi Okotieuro, and seconded by Vice Chairman Philip Berry, followed by public comment and panel discussion. The resolution approving the grade reconfiguration of PS 046M Arthur Tappan was adopted unanimously, and the resolution approving the grade reconfiguration of Mott Hall V was adopted unanimously. (Resolution for PS46M Arthur Tappan, Resolution for Mott Hall V and corresponding Educational Impact Statements attached via link to the Panel for Educational Policy website)*
- F. Approval of Chancellor's Regulations—*Motion to adopt resolutions to approve Regulation A-190, and amendments to Regulations C-30, C-37, and A-501 was made by Vice Chairman Philip Berry, and seconded by Panel Member Gitte Peng, followed by public comment and panel discussion. The resolution approving Regulation A-190 was approved by a vote of 10-1 (yea: Berry, Bryant, Chan, Chang, Hernandez, Morales, Okotieuro, Peng, and Sullivan; nay: Santos). The resolution approving the amendment of Regulation C-37 was approved by a vote of 10-1 (yea: Berry, Bryant, Chan, Chang, Hernandez, Morales, Okotieuro, Peng, and Sullivan; nay: Santos). The resolution approving the amendment of Regulation C-30 was approved by a vote of 10-1 (yea: Berry, Bryant, Chan, Chang, Hernandez, Morales, Okotieuro, Peng, and Sullivan; nay: Santos). The resolution approving the amendment of Regulation A-501 was approved by a vote of 9-2 (yea: Berry, Bryant, Chan, Chang, Hernandez, Morales, Okotieuro, and Peng; nay: Santos and Sullivan). (Resolutions and corresponding Regulations attached via link to the Panel for Educational Policy website)*

G. Public Comments on Other Topics

The meeting adjourned at 9:40 P.M.

A full recording of the meeting is available [here](#).

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ATTACHMENT G

FURTHER EXPLANATION OF THE ADMINISTRATOR'S DECISIONS

VIA U.S. First Class Mail

December 2, 2013

Jean Cherfils
New York City Department of Education
52 Chambers Street, Room 219
New York, NY 10007

FCC Form 471 Application Numbers: 755776, 821325, 875253
Funding Request Numbers: 2239569, 2237088, 2389503
Funding Years: 2010, 2011 and 2012

Along with this letter, you are also being sent Commitment Adjustment Letters (“CALs”) and Funding Commitment Decision Letters (“FCDLs”) that rescind the previously approved commitment for Funding Year (“FY”) 2010 and deny funding requested in the FYs 2011 and 2012 applications for the funding request numbers (“FRNs”) referenced above.

The purpose of this letter is to provide you with additional information concerning the reasons for the Administrator’s decisions to rescind the funding commitment and deny funding for the above-referenced applications and funding requests for FYs 2010, 2011 and 2012.

Please be advised that the CALs and the FCDLs are the official action by the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Company (“USAC”) regarding these federal Universal Service Schools & Libraries Support Mechanism (also known as the “Schools and Libraries Program” or the “E-rate Program”) funding applications and requests. Please refer to these letters for instructions on how to appeal the Administrator’s decisions, if you decide to take such action.

I. Overview of the Regulatory Framework for the E-rate Program

A. FCC Requirements for Applying and Requesting E-rate Program Funding

Federal Communications Commission’s (“FCC’s”) rules require applicants to seek competitive bids for all services and equipment eligible for E-rate discounts.¹ Applicants

¹ See 47 C.F.R. § 54.504(a) (2009 and 2010); 47 C.F.R. § 54.503(a)-(b) (2011). See also *In the Matter of Fed.-State Joint Bd. on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, 12 FCC

initiate the competitive bidding process by submitting an FCC Form 470 to USAC for posting on USAC's website. Applicants are also required to ensure that the FCC Form 470 "describe[s] the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids."² The posting of the FCC Form 470 enables prospective service providers to bid on the equipment and services for which the applicant will request E-rate funding support. Applicants are further required to indicate on their FCC Form 470 whether they have or will issue an RFP for the services and equipment sought on the FCC Form 470.³ The failure to notify potential bidders of the availability of an RFP on the FCC Form 470 is a rule violation and may result in the denial of funding.⁴

After USAC posts the FCC Form 470 on its web site, the FCC rules require applicants to: (1) wait at least 28 days before entering into agreements with service providers (to provide one or more of the services and/or products listed on the FCC Form 470);⁵ and (2) comply with all applicable state and local procurement laws, as well as the competitive bidding requirements established by the FCC.⁶

Rcd 8776, ¶ 480 (1997) ("1997 Universal Service Order") (finding that "fiscal responsibility compels us to require that eligible schools and libraries seek competitive bids for all services eligible for [E-rate] discounts.").

² 1997 Universal Service Order, 12 FCC Rcd at 9078, ¶ 575. See also 47 C.F.R. § 54.504(b) (2009 and 2010) ("An eligible school, library...seeking to receive discounts for eligible services under this subpart shall submit a completed FCC Form 470 to the Administrator."); 47 C.F.R. § 54.503(c)(1) (2011) ("An eligible school, library...seeking to receive discounts for eligible services under this subpart shall submit a completed FCC Form 470 to the Administrator to initiate the competitive bidding process.").

³ See *In the Matter of Request for Review of the Decision of the Universal Service Adm'r by Ysleta Ind. Sch. Dist., et al.*, CC Docket Nos. 96-45, 97-21, Order, FCC 03-313, 18 FCC Rcd 26407, 26424, ¶ 39 (2003) (clarifying that applicants must indicate on their FCC Forms 470 that they have released or will release an RFP and that the RFP must be available for 28 days). See also, e.g., Schools and Libraries Universal Service Description of Services Requested and Certification Form Instructions, at 12 (OMB 3060-0806) (Oct. 2004) ("FCC Form 470 Instructions") ("Item 9a-Check this box if you have released or intend to release a Request for Proposal (RFP) that will provide potential bidders with specific information about the particular Internet Access services or functions you are seeking, and what quantity and/or capacity you seek."); Schools and Libraries Universal Service Description of Services Requested and Certification Form 470 at Block 2: Line 9 (OMB-3060-0806) (Oct. 2004) ("FCC Form 470") (requiring applicants to indicate whether they "have a Request for Proposal (RFP) that specifies the services you are seeking" and providing that "if you check NO and you have or intend to have an RFP, you risk denial of your funding requests.").

⁴ *In the Matter of Requests for Review and/or Waiver of Decisions of the Universal Service Adm'r by Al-Ihsan Academy South Ozone Park, et al.*, CC Docket No. 02-6, Order, DA 11-1974, 26 FCC Rcd 16415, 16416, 16417, ¶¶ 2, 6 (2011) (providing "[a]n applicant must indicate on its FCC Form 470 that it is using an RFP for procurement purposes" and upholding USAC's determination that the applicant violated E-rate program rules when it failed to indicate on the FCC Form 470 that it had issued an RFP, where the RFP contained additional information not provided in the FCC Form 470 including network schematics and diagrams of school buildings.).

⁵ See 47 C.F.R. § 54.504(b)(4) (2009 and 2010); 47 C.F.R. § 54.503(c)(4) (2011). See also Schools and Libraries Universal Services Order and Certification Form Instructions, at 3 (OMB 3060-0806) (Oct. 2010) ("FCC Form 471 Application Instructions") ("Form 471 must be filed AFTER a Form 470, which must be posted on the SLD section of the USAC web site for at least 28 days before the Form 471 is filed.").

⁶ See 47 C.F.R. § 54.504(a) (2009 and 2010) (providing that the FCC competitive bidding requirements "apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements"); 47 C.F.R. § 54.503(b) (2011) (same).

FCC rules further require applicants to “carefully consider all bids submitted” and select “the most cost-effective service offering” using the price of eligible goods and services as the primary factor.⁷ Consistent with this requirement “requests for duplicative services, described as services that provide the same functionality for the same population in the same location during the same period of time, will be rejected.”⁸ Applicants are not permitted to request identical services from multiple providers “when the additional service providers’ bids were not the most cost-effective.”⁹ Specifically, in the *Macomb Order*, the Commission clarified that the applicant violated the Commission’s rules when it selected multiple service providers to provide T3 lines and did not show that the lowest-cost bidder was unable to provide all of the necessary requested T3 lines.¹⁰ The failure to comply with the FCC’s cost-effectiveness rule may result in the denial of funding.¹¹

Applicants are also required to file the FCC Form 471 application to request E-rate program funding with USAC after selecting the service provider(s).¹² FCC rules require applicants to have a signed contract or a legally binding agreement with the selected providers for all services (that are not month-to-month or provided on a tariffed basis) at the time the FCC Form 471 is submitted.¹³ The failure to comply with this requirement may also result in the denial of funding.¹⁴

⁷ *Id.* at § 54.511(a) (2009-12). *See also* 47 C.F.R. §§ 54.503(c)(2)(vii), 54.504(a)(1)(xi) (2011) (requiring applicants to certify on FCC Forms 470 and 471 respectively that the most cost-effective bid will be or was selected); 47 C.F.R. §§ 54.504(b)(2)(vii), 54.504(c)(1)(xi) (2009 and 2010) (same); *In the Matter of Requests for Review of Decisions of the Universal Service Adm’r by Spokane Sch. Dist.*, CC Docket No. 02-6, Order, DA 13-885, 28 FCC Rcd 6026, 6028, ¶ 4 (2013) (“[A]pplicants must use the price of eligible services as the primary factor when selecting the winning offer for E-rate supported services.”).

⁸ *In the Matter of Requests for Review by Macomb Intermediate Sch. Dist. Tech. Consortium*, CC Docket No. 02-6, Order, FCC 07-64, 22 FCC Rcd 8771, ¶ 3 (2007) (“*Macomb Order*”).

⁹ *Id.* at 8774, ¶ 8. *See also* Eligible Services List Schools and Libraries Support Mechanism for FY 2010, at 23, 33 (providing “[d]uplicative products or services are not eligible. Any product or service that is duplicative of a service already requested or being used by the applicant will not be eligible” and defining “duplicative services” as “[t]hose that deliver the same functionality to the same population in the same location during the same period.”); Eligible Services List Schools and Libraries Support Mechanism for FY 2011, at 23 (providing “[a]ny product or service that is duplicative of a service for which funding has already been requested” is not eligible); Eligible Services List Schools and Libraries Support Mechanism for FY 2012, at 24 (same).

¹⁰ *See Macomb Order*, 22 FCC Rcd at 8774, ¶¶ 7-8. The Commission also found that it would have been more cost-effective for the applicant to seek all of the necessary T3 lines from the single, lowest bidder. *See id.* at 8778, ¶ 7.

¹¹ *See Id.* at 8774, ¶ 8. (upholding USAC’s denial of funding on the grounds that the applicant failed to select the most cost-effective service provider).

¹² *See* 47 C.F.R. § 54.504(c) (2009 and 2010); 47 C.F.R. § 54.504(a) (2011).

¹³ *See, e.g.,* 47 C.F.R. § 54.504(c) (2009) (“An eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall, upon signing a contract for eligible services, submit a completed FCC Form 471 to the Administrator.”); *FCC Form 471 Instructions* at 23 (Nov. 2004) (“You MUST sign a contract for all services you order on your Form 471” except for month-to-month and tariffed services); *In the Matter of Requests for Review and/or Requests for Waiver of the Decisions of the Universal Service Adm’r by Animas Sch. Dist. 6 Animas, et al.*, CC Docket No. 02-6, Order, DA 11-2040, 26 FCC Rcd 16903, 16903 ¶ 1 (2011) (“*Animas Order*”) (referencing the “Commission’s rule that a contract or legally binding agreement be in place when the FCC Form 471 application is submitted”).

B. USAC is Required to Deny or Rescind E-rate Funding Requests When E-rate Program Rule Violations are Determined

FCC rules require USAC to review and approve funding requests for the E-rate Program in accordance with the Commission's rules and orders.¹⁵ USAC will "deny a funding request outright upon discovering a particular infirmity in the application review process, because the applicant has failed to meet one or more of the necessary requirements for receipt of support..."¹⁶ Thus, if USAC determines during the application review process that the applicant was not compliant with FCC rules, USAC will deny the funding requests at issue.

FCC rules further require USAC to rescind commitments and seek recovery of funding when it determines that funding was disbursed in violation of program rules or to prevent waste, fraud or abuse.¹⁷ Consistent with FCC rules and orders, USAC will seek recovery if there is no contract or legally binding agreement between the applicant and the service provider at the time the FCC Form 471 was submitted to USAC.¹⁸ Similarly, USAC will also seek recovery when applicants fail to select the most cost-effective service offering as required by the Commission's rules.¹⁹

¹⁴ See, e.g., *In the Matter of Request for Review of a Decision of the Universal Service Adm'r by Special Education Dist. of Lake County*, CC Docket No. 02-6, Order, DA 12-1221, 27 FCC Rcd 8905, 8905 ¶ 2 (2012) ("*Lake County Order*") (upholding USAC's denial of funding where the applicant did not sign contracts or provide evidence of a legally binding agreement before submitting the FCC Form 471 for FY 2009).

¹⁵ See generally 47 C.F.R. §§ 54.705(a), 54.707 (authorizing USAC to establish procedures for administering the E-rate program and to verify discounts, offsets, and support amounts provided by the universal service support programs).

¹⁶ *In the Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Rep. and Order and Order, FCC 04-190, 19 FCC Rcd 15808, 15812, ¶ 10 (2004) ("*Fifth Rep. & Order*").

¹⁷ See *In the Matter of Changes to the Bd. of Dirs. of the Nat'l Exch. Carrier Ass'n, Fed.-State Joint Bd. on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, FCC 99-291, 17 Communications Reg. (P&F) 1192 (1999) ("*Commitment Adjustment Order*"); *In the Matters of Changes to the Bd. of Dirs. of the Nat'l Exch. Carrier Ass'n, Fed.-State Joint Bd. on Universal Service*, CC Docket Nos. 97-21, 96-45, Order, FCC 00-350, 15 FCC Rcd 22975, (2000) ("*Commitment Adjustment Implementation Order*"); *Fifth Rep. & Order*, 19 FCC Rcd at 15815-18, ¶¶ 18-29.

¹⁸ See Letter from Dana Shaffer, Chief, Wireline Competition Bureau, FCC to Scott D. Barash, Acting CEO, USAC, CC Docket No. 02-6, DA 09-86, 24 FCC Rcd 417 (2009) ("Consistent with the Commission's direction, contract guidance information on USAC's website no longer requires a contract to be signed and dated by both parties. Thus, USAC should not recover funding if there was a binding agreement that was legal under state law."); *Lake County Order*, 27 FCC Rcd at 8905, ¶ 2 (upholding USAC's denial of funding where the applicant did not sign contracts or provide evidence of a legally binding agreement before submitting FCC Form 471).

¹⁹ See 47 C.F.R. §§ 54.503(b)(2)(vii), 54.503(c)(1)(vii), 54.511(a) (2009-2010); 47 C.F.R. §§ 54.503(c)(1)(xi), 54.504(a)(1)(xi), 54.511(a) (2011). See also *Macomb Order*, 22 FCC Rcd at 8774, ¶ 6 (providing "[w]e uphold USAC's determination that Macomb ISD violated program rules by not selecting the most cost-effective service offering.").

II. Factual Background

A. NYC DOE's Competitive Bid Process for Internet Access Services for FYs 2010-2012

On December 7, 2009, NYC DOE released Request for Bid No. B1389 ("RFB No. B1389"), which sought Internet Access services for a three-year term.²⁰ RFB No. B1389 provided that "[t]his procurement must be accelerated for completion by February 1 so that the awards will be eligible for E-rate funds. These contracts will become active as of July 1, 2010."²¹ RFB No. B1389 further provided that "[t]he DOE anticipates entering into two (2) contracts resulting from this Request for Bid (RFB) to provide Internet access to all DOE schools and offices."²² TW Telecom Holdings Inc. ("tw telecom") and RCN New York (now Sidera Networks) ("Sidera") submitted bids in response to RFB No. B1389. Sidera's bid prices were lower than tw telecom's prices for the requested Internet access services.²³ Ultimately, NYC DOE selected both tw telecom and Sidera as its service providers with each providing half of the requested Internet access services for a three-year term.²⁴

On February 8, 2010, NYC DOE filed FY 2010 FCC Form 471, Application No. 755776, requesting Internet access services from tw telecom for FRN 2239569 and from Sidera for FRN 2042305. NYC DOE used the same Block 4 worksheet for both FRNs that included all of the schools where the requested Internet access services would be provided. On the FCC Form 471, NYC DOE indicated that both FRNs were for month-to-month services, and certified that "[t]here are signed contracts covering all of the services listed on this Form 471 except for those services provided under non-contracted tariffed or month-to-month arrangements."²⁵ For both FRNs, NYC DOE cited to FCC Form 470, No. 284450000788856, which was posted on December 3, 2009. USAC issued FCDLs approving the requested funding and disbursed funds for both FRNs.

²⁰ See Request for Bid No. B1389, Title: Internet Service Provider (Dec. 7, 2009), at 5 ("RFB No. B1389") (providing "[t]he contract term is 3 years with two options to extend for one year each at DOE's sole discretion.").

²¹ *Id.* at 5.

²² *Id.* See also NYC DOE Request for Bid (RFB) No. B1389 Internet Services Provider (ISP) Services, Pre-proposal Conference PowerPoint Presentation (Dec. 15, 200[9]), at 4, 10 (providing "NYC Department of Education (DOE) expects: [t]o select [t]wo vendors to bring Internet Services to the DOE. Awards will be for locations at 3 DOE Integrated Service Center (ISCs)" and that "DOE will be selecting two Vendors.").

²³ See NYC DOE, Request for Authorization Internet Service Provider Services, at 2.

²⁴ See The City of New York Financial Management System Advice of Award for Master Agreement at 1 (tw telecom) (Aug. 2, 2010); The City of New York Financial Management System Advice of Award for Master Agreement at 1(Sidera) (July 12, 2010); Letter from Jean Cherfils, NYC DOE, to Catriona Ayer, USAC, at 3 (Aug. 1, 2013) ("August 2013 Response") ("NYCDOE did select two service providers to provide internet access, of which TW Telecom was one....The primary reason NYCDOE decided to use a load sharing solution was because it could not obtain sufficiently reliable, consistent service from one provider.").

²⁵ FCC Form 471, Application No. 755776 at Line 15a for each FRN 2042305 and 2239569 and at Block 6, Line 30.

On March 22, 2011, NYC DOE filed FY 2011 FCC Form 471, Application No. 821325, requesting Internet access services from tw telecom for FRN 2237088 and from Sidera for FRN 2237090. NYC DOE used the same Block 4 worksheet for both FRNs that included all of the schools where the requested Internet access services would be provided. FCC Form 471, No. 821325, also indicated that the requested services for both FRNs were month-to-month services.²⁶ FCC Form 470 No. 501890000790229 was posted on December 8, 2009, and indicated that NYC DOE had issued an RFP for the requested Internet access services.²⁷

On March 16, 2012, NYC DOE filed FY 2012 FCC Form 471, Application No. 875253, requesting Internet access services from tw telecom for FRN 2389503 and from Sidera for FRN 2389504. NYC DOE used the same Block 4 worksheet for both FRNs that included all of the schools where the requested Internet access services would be provided. On the FCC Form 471, Application No. 875253, NYC DOE indicated that both FRNs were provided under contract and cited to FCC Form 470 No. 501890000790229 as the establishing FCC Form 470.²⁸ As noted above, the FCC Form 470 indicated that NYC DOE had issued an RFP for the requested services.

B. USAC's Competitive Bid Review Regarding NYC DOE's Internet Access FRNs

On March 18, 2013, USAC sent NYC DOE competitive bidding questions regarding the FYs 2011 and 2012 tw telecom and Sidera Networks FRNs for Internet access services.²⁹ USAC asked NYC DOE to provide copies of its competitive bidding documents, including "1) [s]igned and dated copies of any and all agreements related to each of the FCC Form 471 request(s) including any and all contracts, agreements, Statements of Work, etc." and "5) a copy of all correspondence between your entity and any service providers or consultants regarding the competitive bidding process and the application process."³⁰ Throughout the competitive bid review, NYC DOE had multiple opportunities to provide information and documentation to USAC for the contract supporting the tw telecom FRNs under review. To date, NYC DOE has not provided any documents in which NYC DOE communicated its acceptance of the bid response to tw telecom prior to February 8, 2010, the date NYC DOE submitted FCC Form 471, Application No. 755776. In addition, NYC DOE has not provided USAC with copies of an executed contract between NYC DOE and tw telecom for the requested Internet access services.

²⁶ See FCC Form 471, Application No. 821325 at Line 15a and b for each FRN 2237088 and 2237090. However, on May 23, 2013, NYC DOE stated that it made a clerical error when it indicated that these services were month-to-month on the FCC Form 471 application. NYC DOE further stated that these services were contractual and were based on RFB B1389. See also Responses from Jean Cherfils, NYC DOE to Dhara Patel, SLD (May 31, 2013), at 3 ("May 31 Response").

²⁷ See FCC Form 470, No. 501890000790229 at Line 9a.

²⁸ See FCC Form 471, Application No. 875253 at Line 12 and Line 15a and b for both FRNs.

²⁹ See Email from Dhara Patel, SLD, to Jean Cherfils, NYC DOE (Mar. 18, 2013).

³⁰ Selective Review Instructions and Worksheet, at 4 and 5 (issued to NYC DOE on Mar. 18, 2013).

On April 25, 2013, USAC sent NYC DOE follow-up questions that reiterated USAC's March 2013 requests for copies of NYC DOE's contract for these two FRNs. USAC's April 2013 letter further advised NYC DOE that "[f]ailure to send all of the information requested may result in a reduction or denial of funding."³¹

On May 21, 2013, USAC issued an Intent to Deny Notification for the tw telecom FRNs for FY 2011 and FY 2012 to NYC DOE.³² USAC's May 2013 Notification explained "[t]he FRNs listed above will be denied because during the competitive bidding review you failed to provide the contract associated with these funding requests. The copy of 'Request for Authorization Internet Service Provider Services' and 'Public Meeting of the Panel for Educational Policy Contract Agenda' provided discuss the merits of these bids and recommend award. However, neither document is the valid contract that was in place at the time of the filing of the application as required by FCC rules. Since you have not provided the contract to USAC we are unable to determine that you are in compliance with the FCC rules and program requirements regarding competitive bidding and that you had a valid contract in place at the time of the filing of the application as required by FCC rules."³³ USAC further advised NYC DOE that "[t]his is your final opportunity to provide the missing information to USAC so that we can include it in our review. If we do not receive complete information from you by close of business on June 5, 2013, we will issue the funding decision denials."³⁴

On May 31, 2013, NYC DOE responded and provided the following documents asserting that these documents were the contracts for the FY 2011 and 2012 tw telecom and Sidera FRNs:

- RFB No. B 1389 (published Dec. 7, 2009).
- Attachment B of tw telecom and Sidera's bid responses.
- Request for Authorization Internet Service Provider Services, and Approval Form (signed by the Chancellor on February 2, 2010).
- Signature Sheet for RFB B.1389 (tw telecom, dated July 22, 2010; Sidera, dated Mar. 26, 2010).
- City of New York Financial Management System Advice of Award for Master Contract Agreement to tw telecom (dated Aug. 2, 2010)("Notice of Award").
- City of New York Financial Management System Advice of Award for Master Contract Agreement to Sidera (dated July 12, 2010) ("Notice of Award").
- Correspondence between NYC DOE and the New York Comptroller's Office concerning the registration of the tw telecom and Sidera contracts (dated Aug. through Sept. 2010).

Following review of the additional information and documents, on July 17, 2013, USAC issued a Notification of USAC's Intent to Rescind and Deny Certain FY 2010 through

³¹ Letter from Dhara Patel, SLD, to Jean Cherfils, NYC DOE at 6 (Apr. 25, 2013).

³² See Letter from Dhara Patel, SLD, to Jean Cherfils, NYC DOE at 1 (May 21, 2013) ("May 2013 Notification").

³³ *Id.* at 3.

³⁴ *Id.* at 1 (emphasis in original removed).

FY 2012 Funding Requests to NYC DOE.³⁵ For FY 2010 FRN 2239569, USAC explained that “[b]ased on the documents that NYC DOE provided to USAC on May 31, 2013, NYC DOE did not have [a] legally binding agreement or contract with TW Telecom for FY 2010 until it awarded the contract to TW Telecom on August 2, 2010....The August 2, 2010 document is the only document provided to USAC that shows NYC DOE accepted TW Telecom’s bid and awarded the contract to TW Telecom.”³⁶ USAC informed NYC DOE that it intended to rescind the funding commitment for FRN 2239569 because NYC DOE did not have a legally binding agreement with tw telecom until August 2, 2010.

USAC’s July 2013 Notification also explained that USAC would rescind FY 2010 FRN 2239569 and deny tw telecom FYs 2011-2012 FRNs 223708 and 238903 because “NYC DOE failed to select the most cost-effective service offering in violation of FCC Rules.”³⁷ Specifically, USAC explained that it was taking these actions because “NYC DOE sought E-rate funding for Internet access services from multiple service providers for the same locations and time periods on its FCC Form 471, Application Nos. 775776, 821325 and 875253.”³⁸ USAC further explained that “[t]he documents that NYC DOE provided to USAC on May 31, 2013, indicate that NYC DOE selected both TW Telecom and Sidera Networks (formerly RCN New York Communications) (Sidera) to each provide half of the requested services to the same locations during the same time periods.”³⁹ USAC stated that “Sidera’s bid for the requested Internet access services was lower than TW Telecom’s bid for the same services” and that “the documents provided to USAC do not indicate that Sidera was unable to provide all of the requested Internet access services to NYC DOE.”⁴⁰ USAC further explained that for these reasons “TW Telecom’s services were not the most cost-effective offering as required by the FCC’s rules and the *Macomb Order*” and that “NYC DOE violated the Commission’s rules when it selected requested Internet access services instead of seeking all of the requested Internet access services from the lowest-cost bidder, Sidera.”⁴¹ USAC also provided that “this is NYC DOE’s final opportunity to provide any additional information to USAC so that it can be included [in] USAC’s Competitive Bidding Review.”⁴²

On August 1, 2013, NYC DOE responded to USAC’s July 2013 Notification and requested that USAC reconsider its positions. NYC DOE asked USAC to conclude that a legally binding agreement existed between the parties based on the “Request for Authorization,” which the Chancellor appeared to approve on February 2, 2010, and correspondence between NYC DOE and tw telecom from February and March 2010 discussing a “kickoff meeting” concerning “the tw telecom Internet bid response and

³⁵ See Letter from Catriona Ayer, USAC, to Jean Cherfils, NYC DOE at 1 (July 17, 2013) (“July 2013 Notification”).

³⁶ *Id.* at 2.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *Id.*

implementation process moving forward.”⁴³ In addition, NYC DOE disagreed that *Macomb* was applicable and asked USAC to conclude that NYC DOE complied with the cost-effectiveness requirements on the grounds that “it has not sought funding for duplicative services....While the two internet services providers do provide the same functionality, they each are responsible for providing half of the NYCDOE’s needs and therefore, do not serve the same population in the same location for the same period of time.”⁴⁴

III. DISCUSSION

A. NYC DOE Failed to Demonstrate That it Had a Signed Contract or a Legally Binding Agreement with TW Telecom at the time the FY 2010 FCC Form 471 Application was submitted to USAC on February 8, 2010

As explained above, FCC rules require applicants to have a signed contract or legally binding agreement for requested E-rate eligible services (that are not provided on a month-to-month or tariffed basis) at the time the FCC Form 471 funding application is submitted to USAC.⁴⁵ As explained further below, the documents provided to USAC during the competitive bidding review and on August 1, 2013 do not demonstrate that NYC DOE had a legally binding agreement with tw telecom on February 8, 2010, the date that NYC DOE filed FY 2010 FCC Form 471, Application No. 755776.

Pursuant to New York state law, NYC DOE was required to have a written agreement for the Internet Services requested from tw telecom for FYs 2010-2012 because RFB No. B1389 requested services for a three-year term, and the contract, therefore, could not be performed within one year from the date the contract was made.⁴⁶ The courts have explained that “[t]o establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent and an intent to be bound”⁴⁷ and that “[s]uch acceptance must be clear and unequivocal.”⁴⁸ The courts

⁴³ Email from William Gill, tw telecom, to Joseph Iacoviello, NYC DOE (Feb. 25, 2010) (Attachment G to August 2013 Response). See also August 2013 Response at 2.

⁴⁴ August 2013 Response at 3.

⁴⁵ See, e.g., 47 C.F.R. § 54.504(c) (2009) (“[a]n eligible school, library, or consortium that includes an eligible school or library seeking to receive discounts for eligible services under this subpart, shall, upon signing a contract for eligible services, submit a completed FCC Form 471 to the Administrator.”); *FCC Form 471 Instructions* at 23 (Nov. 2004) (“You MUST sign a contract for all services you order on your Form 471” except for month-to-month and tariffed services); *Animas Order*, 26 FCC Rcd at 16903 ¶ 1 (referencing the “Commission’s rule that a contract or legally binding agreement be in place when the FCC Form 471 application is submitted.”); *Lake County Order*, 27 FCC Rcd at 8905 ¶ 2 (upholding USAC’s denial of funding where the applicant did not sign contracts or provide evidence of a legally binding agreement before submitting the FCC Form 471).

⁴⁶ See N.Y. Gen. Obl. Law § 5-701(a) (providing that “[e]very agreement, promise or undertaking is void, unless some note or memorandum thereof be in writing” if, for example, the agreement, promise or undertaking “[b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime”).

⁴⁷ *Kowalchuk v. Stroup*, 61 A.D.3d 118, 121 (N.Y. App. Div. 2009). See also, *D’Agostino Gen. Contrs., Inc. v. Steve Gen. Contr. Inc.*, 267 A.D.2d 1059, 1059 (N.Y. App. Div. 1999) (upholding determination that

have also acknowledged that a legally binding agreement may exist even when parties have not executed a formal contract,⁴⁹ but courts have consistently held that an RFP and bid responses alone do not constitute a legally binding agreement.⁵⁰ Further, “an advertisement for bids or tenders is not itself an offer but the bid or tender is an offer which creates no right until accepted ... a contract is not formed until the lowest bid is in fact accepted.”⁵¹ Pursuant to New York law, in order to form a legally binding agreement after an RFB is issued and bid responses are submitted, acceptance of the bid must be conveyed to the winning bidder(s), and acceptance must be clear and unequivocal.⁵²

As explained in USAC’s July 2013 Notification, the documents that NYC DOE provided to USAC during the competitive bid review did not demonstrate that NYC DOE had a contract or legally binding agreement with tw telecom at the time the FY 2010 FCC Form 471, Application No. 755776, was submitted on February 8, 2010.⁵³ To date, NYC DOE has not provided USAC with a copy of an executed contract with tw telecom for the requested services.

The language included in NYC DOE’s RFB No. B1389 clearly states that NYC DOE did not intend to be bound by the bid responses. Specifically, RFB No. B1389 provided that “[t]he DOE reserves the right to (i) reject all bids submitted” and that “[n]o Vendor will

there was no breach of contract where the record established that the party “never communicated [his] acceptance of the original bid...and thus no contract was formed based upon that bid”).

⁴⁸ *Diarassouba v. Urban*, 71 A.D.3d 51, 58 (N.Y. App. Div. 2009). See also, *Molloy v. City of Rochelle*, 198 N.Y. 402, 408 (Ct. App. 1910) (providing that “[t]he awarding of the contract on the part of the officer to one of several bidders requires the exercise on his part of judgment and discretion and the award itself should be manifested by some formal official action on his part, and ordinarily reduced to writing and made a part of the records in his department. In no other way can the rights of parties be preserved, at least prior to the actual execution of the contract.”) (internal citation omitted).

⁴⁹ See, e.g., *Lord Elec. Co. v. Litke*, 469 N.Y.S.2d 846, 848 (1983) (“There is a well established body of case law holding that upon award of a public contract in binding contract between the bidder and the awarding agency is established...Thus, it has been held that the fact that the contract has not been executed or that the comptroller has not registered the contract would not be fatal to the formation of a contract.”) (internal citations omitted).

⁵⁰ See *Molloy*, 198 N.Y. at 408 (explaining that no contractual relationship can arise merely from a bid unless the terms of the statute provides that the advertisement of the bid will provide acceptance without any further action on part of the municipality).

⁵¹ Samuel Williston and Clarence Martin Lewis, *The Law of Contracts*, vol 1. § 31 at 42 (Baker, Voorhis & Co. 1920).

⁵² See *D’Agostino*, 267 A.D.2d at 1059 (upholding the lower court’s determination that there was no breach of contract where the record established that the party “never communicated [his] acceptance of the original bid.... and thus no contract was formed based upon that bid.”); *Diarassouba*, 71 A.D.3d at 58 (“In order to produce a legal contract, there must be an actual acceptance. Such acceptance must be clear and unequivocal....”) (internal citations omitted). See also *Molloy*, 198 N.Y. at 408 (“The awarding of the contract on the part of the officer to one of several bidders requires exercise on his part of judgment and discretion and the award itself should be manifested by some formal official action on his part and ordinarily reduced to writing and made a part of the records in his department. In no other way can the rights of the parties be preserved, at least prior to the actual execution of the contract. The mere arithmetical operation of ascertaining which bid is the lowest does not constitute an award.”) (internal citation omitted).

⁵³ See July 2013 Notification, at 2.

have any rights against the DOE arising at any stage of the solicitation from any negotiations that take place, or from the fact that the DOE does not select a Vendor for negotiations.”⁵⁴ Thus, there is no legally binding agreement based on RFB B1389 and tw telecom’s bid response pursuant to New York law.

In its August 2013 Response, NYC DOE proffers that there is not “any dispute that NYCDOE had a signed contract with TW Telecom at the time it submitted Form 471.”⁵⁵ NYC DOE explains that the “only issue appears to be the timing of the submission of the Form 471 in the context of the state and local procurement rules for which NYC DOE must comply.”⁵⁶ NYC DOE asserts that “[p]rior to the change in the Education Law that became effective July 1, 2009, the Chancellor’s approval of the Request for Authorization resulted in an executed and legally binding contract; responses to the RFB are binding and the Chancellor’s approval of the Request for Authorization awarded the contract to the selected bidder.”⁵⁷ However, NYC DOE did not provide any statutory provision or New York case law to support its statement that the Chancellor’s approval of the “Request for Authorization” constitutes clear and equivocal acceptance of tw telecom’s bid response as required by New York law.⁵⁸

As explained in its July 2013 Notification, NYC DOE has not provided USAC with any evidence that it accepted tw telecom’s bid before it submitted its FCC Form 471 application on February 8, 2010.⁵⁹ There is no indication in the Request for Authorization that tw telecom was notified by NYC DOE that its bid was accepted. Rather, the Request for Authorization appears to be an internal NYC DOE document seeking approval from the Chancellor to allow NYC DOE to proceed with awarding contracts to the selected vendors. Specifically, the document provides that “[a]pproval is sought to contract with RCN New York Communications and TW Telecom, to provide access to the Internet.”⁶⁰ Further, the Request for Authorization does not indicate that tw telecom was notified that NYC DOE accepted its bid and agreed to be bound by the terms of the bid response. Thus, the Request for Authorization does not demonstrate that NYC

⁵⁴ RFB No. B1389 (as amended Dec. 18, 2009), Section 5.2.5, at 24. In addition, NYC DOE reserved the right to negotiate the submitted bids, and require revisions, corrections, or changes to a bid, and re-open negotiations after the best and final offer procedure “if it is in the Department’s best interest to do so.” *Id.* See also *id.* at Section 5.2.8. at 25 (providing “[t]he contract resulting from this RFB will be signed by the Vendor within a reasonable time upon receipt, which period will not exceed 30 days”); Section 5.2.10 at 25 (providing that “[t]he onus is upon you to offer competitive pricing and to keep exceptions to our standard terms and conditions to a minimum.... We will negotiate commercial agreements with you and dispose of legal issues, insurance requirements, exceptions to the Terms & Conditions if, and only if, your bids are considered competitive. Following these negotiations, we will request a Best and Final Offer from vendors still considered to be in the competitive range.”).

⁵⁵ August 2013 Response, at 1. In fact, USAC does not find that NYC DOE had a contract with tw telecom at the time the FY 2010, FCC Form 471, Application No. 755776 was submitted on February 8, 2010.

⁵⁶ *Id.*

⁵⁷ *Id.* at 2.

⁵⁸ See *Diarassouba*, 71 A.D. 3d at 58.

⁵⁹ See July 2013 Notification, at 2.

⁶⁰ Request for Authorization Internet Service Provider Services, at 1.

DOE accepted tw telecom's bid and conveyed its acceptance to tw telecom as required by New York law.⁶¹

In its August 2013 Response, NYC DOE also requests that USAC waive the Commission's rules requiring a contract at the time the FCC Form 471 is submitted due to the changes that were occurring in New York procurement laws at the time NYC DOE was conducting the bid process for RFB B1389. NYC DOE argues that it had an "executed contract" at the time the FCC Form 471 was submitted, but acknowledges that it "had not yet completed all of the post-contract execution steps of its new procurement process."⁶² NYC DOE requests that USAC find the executed contract satisfies the FCC requirement that NYC DOE have a signed contract at the time it files its FCC Form 471.⁶³

In support of its request, NYC DOE relies on the Commission's language in the *Barberton Order* that says "rigid adherence to certain E-rate rules and requirements that are 'procedural' in nature does not promote the goals of section 254 of the [Communications Act of 1934] - ensuring access to discounted telecommunications and information services to schools and libraries – and therefore, does not serve the public interest."⁶⁴ In addition, to support its request that NYC DOE has satisfied the Commission's requirement for having a signed contract at the time it filed its FCC Form 471, NYC DOE cites to the *Bishop Perry Order*, where the Commission granted applicants a limited waiver for certain E-rate program procedural application filing rules. NYC DOE concludes based on these two orders that USAC should find that NYC DOE has complied with the Commission's rule requiring a signed contract at the time the FCC Form 471 is submitted.⁶⁵

USAC, however, is not authorized to waive the FCC's rules.⁶⁶ Although the *Barberton Order* includes the language cited above regarding rigid adherence to certain E-rate program rules and requirements, this language actually addresses the Commission's standard for granting waivers for certain E-rate program rule violations and does not authorize USAC to waive the Commission's rules.⁶⁷ Similarly, the *Bishop Perry Order* does not authorize USAC to waive any Commission rules.⁶⁸ Instead in *Bishop Perry*, the

⁶¹ See *Diarassouba*, 71 A.D. 3d at 58.

⁶² See August 2013 Response, at 1.

⁶³ *Id.*

⁶⁴ See *id.* See also *In the Matter of Request for Review of the Decision of the Universal Service Adm'r by Barberton City Sch. Dist., et al.*, CC Docket 02-6, Order, DA 02-2382, 06-54, Order, 23 FCC Rcd 15526, 15529 ¶ 7 (2008) ("*Barberton Order*").

⁶⁵ See August 2013 Response, at 1.

⁶⁶ See 47 C.F.R. § 54.702 (c) ("The Administrator may not make policy, interpret unclear provisions of the statute or the rules, or interpret the intent of Congress."). See also SLD Presentation, *How Do I Appeal Successfully?* at 4 (September/October 2007) ("Waiver requests should be filed with the FCC"); SLD Training Presentation, *Application Process*, at 42 (September/October 2008) ("Requests for waivers of rules must be filed with the FCC").

⁶⁷ See *Barberton Order*, 23 FCC Rcd at 15529, ¶ 7.

⁶⁸ See *In the Matter of Request for Review of the Decision of the Universal Service Adm'r by Bishop Perry Middle Sch., et al.*, CC Docket 02-6, Order, FCC 06-54, Order, 21 FCC Rcd 5316, 5319-20, ¶ 6 (2006)

Commission directed USAC to allow applicants the opportunity to correct ministerial and clerical errors that are found in their applications and to submit certifications after the filing deadline date.⁶⁹

Furthermore, neither order relieves applicants of their obligation to have a signed contract or legally binding agreement in place at the time their FCC Form 471 funding applications are submitted to USAC. As explained in the *Barberton Order*, “[a]lthough we grant the subject appeals before us, our action here does not eliminate the rule that applicants have a signed contract in place when submitting an FCC Form 471.”⁷⁰ As stated above, NYC DOE has not provided USAC with a copy of an executed signed contract with tw telecom. In addition, USAC also finds, as explained above, that the Chancellor’s approval of the Request for Authorization did not form a binding agreement between tw telecom and NYC DOE because there is nothing within the document that indicates NYC DOE accepted tw telecom’s bid or conveyed NYC DOE’s acceptance to tw telecom, as required by New York law.⁷¹

For the foregoing reasons, USAC has determined that NYC DOE failed to demonstrate that it had a legally binding agreement with tw telecom at the time it filed its FY 2010 FCC Form 471 Application No. 755776 for FRN 2239569 as required by E-rate program rules. For this reason, consistent with the Commission’s rules and orders, USAC will rescind the funding commitment for FY 2010 FRN 2239569 and seek recovery for disbursed funding from NYC DOE.

B. NYC DOE Failed to Demonstrate that the tw telecom FY 2010 to FY 2012 FRNs were the Most Cost-Effective Service Offering as Required by FCC Rules.

As explained above, the FCC’s rules require applicants to carefully consider all bids and select the most cost-effective service offering. Further, the *Macomb Order* clarifies that applicants are prohibited from selecting multiple providers to provide the requested identical services “when the additional service providers’ bids were not the most cost-effective.”⁷²

(*Bishop Perry Order*) (providing “[t]he Commission may waive any provision of its rules on its own motion and for good cause shown. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.”).

⁶⁹ See *id.* at 5326-27, ¶ 23.

⁷⁰ *Barberton Order*, 23 FCC Rcd at 15533, ¶ 11. See also *Bishop Perry Order*, 21 FCC Rcd at 5320, ¶ 9 (“[T]he waivers here should not be read to mean that applicants will not be required in the future to comply fully with our procedural rules, which are vital to the efficient operation of the E-rate program.”). USAC notes that the *Barberton Order* granted several waivers where “contracts had minor errors or were not signed and dated by both parties before the Petitioners filed their FCC Forms 471, they all had some form of an agreement in place during the relevant funding year prior to the filing of their applications.” *Barberton Order*, at 15529, ¶ 7. As explained above, here, NYC DOE failed to demonstrate that it had a legally binding agreement with tw telecom at the time the FY 2010 FCC Form 471 was submitted on February 8, 2010.

⁷¹ See *supra* n.52.

⁷² *Macomb Order*, 22 FCC Rcd at 8774, ¶ 8.

As explained in USAC's July 2013 Notification, the *Macomb Order* requires USAC to deny the tw telecom FRNs for FYs 2010 through FY 2012 because NYC DOE selected two service providers to provide identical services and tw telecom's bid was not the most cost-effective service offering.⁷³ In addition, NYC DOE's documents do not indicate that Sidera, the lowest-cost bidder, could not provide all of the requested services.

Specifically, the documents show that NYC DOE sought approval to contract with both Sidera and tw telecom to provide the requested Internet access services because "[h]aving two vendors/contracts will mitigate the risk that the DOE could lose complete Internet access due to a temporary vendor outage."⁷⁴ Also, as explained above, NYC DOE relied on the same Block 4 worksheet that included all of the schools that would receive services for the tw telecom and Sidera Internet access FRNs. The documents provided also show that Sidera's bid prices for the requested Internet access services were lower than tw telecom's bid prices for the same services.⁷⁵ NYC DOE did not provide any evidence to show that Sidera was unable to provide all of the requested Internet access services to NYC DOE. Therefore, as explained in USAC's July 2013 Notification, because tw telecom's Internet access services were identical to and more expensive than Sidera's services, tw telecom's services were not the most-cost effective offering as required by the FCC's rules and the *Macomb Order*.⁷⁶

NYC DOE's August 2013 Response does not support a different conclusion. In its response, NYC DOE explains that "the breadth and complexity of the NYCDOE's network" required the district to engage two providers given its previous experience with companies who lacked the ability to reliably provide sufficient capacity during peak periods.⁷⁷ Furthermore, NYC DOE asserts that if one provider is unable to provide service for any reason, the other provider can step in to provide service to all schools, thereby ensuring continued connectivity to the schools in the event of a disaster or outage.⁷⁸ NYC DOE also asserts that the two providers did not provide either duplicate or redundant service, and thus, NYC DOE was compliant with the FCC rules prohibiting duplicative services.⁷⁹ NYC DOE further disagrees that *Macomb* was applicable because NYC DOE asserts that the order only applies in cases of duplicate services.⁸⁰ Finally, while not conceding that the services were duplicative, NYC DOE requests that if USAC finds the tw telecom FRNs violate the *Macomb Order*, then the tw telecom FRNs should

⁷³ July 2013 Notification, at 3.

⁷⁴ See Request for Authorization Internet Service Provider Services, at 1. See also NYC DOE Request for Bid (RFB) No. B1389 Internet Services Provider (ISP) Services, Pre-proposal Conference PowerPoint Presentation (Dec. 15, 2009), at 4, 10 (providing "NYC Department of Education (DOE) expects: [t]o select two vendors to bring Internet Services to the DOE. Awards will be for locations at 3 DOE Integrated Service Center (ISCs)" and that "DOE will be selecting two Vendors").

⁷⁵ See, e.g., Request for Authorization Internet Service Provider Services, at 2.

⁷⁶ See 47 C.F.R. § 54.511; *Macomb Order*, 22 FCC Rcd at 8774, ¶ 8. See also July 2013 Notification, at 2-3.

⁷⁷ August 2013 Response, at 3.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *id.*

be funded at the lower rate charged by Sidera for the same Internet access services, and USAC should recover only the difference in the pricing between the two providers.⁸¹

As explained in USAC's July 2013 Notification, the facts in *Macomb* closely parallel the facts regarding NYC DOE's tw telecom FRNs. In both cases, the school district did not want to rely on a single Internet access provider, and sought multiple providers to help ensure consistent Internet access service.⁸² Furthermore, in both cases, the applicant selected providers who each provided a portion of the requested services and argued that the requested services were thus, not duplicative or redundant.⁸³ The fact that both applicants sought only a portion of the requested services from each service provider does not change the fact that the additional providers were not the most cost-effective service provider, as required by FCC rules. In addition, here, as in *Macomb*, there is no evidence that the most cost-effective provider could not provide all of the requested services.⁸⁴ Thus, consistent with the *Macomb Order*, NYC DOE failed to comply with the cost-effectiveness requirement for the tw telecom FRNs. As a result of this rule violation, the FY 2010 FRN for tw telecom is hereby rescinded and the FY 2011 and FY 2012 tw telecom FRNs are denied. USAC cannot fund the tw telecom FRNs at Sidera's lower rate, as requested by NYC DOE, that is not the rate included in tw telecom's bid nor is it the rate that tw telecom is charging for the services at issue.

For the foregoing reasons, USAC has determined that NYC DOE failed to demonstrate that it selected the most cost-effective service offering for tw telecom FRNs 2239569, 2237088, and 2389503 as required by E-rate program rules. For this reason, consistent with E-rate program rules, USAC will rescind the commitment for FRN 2239569, seeking recovery for disbursed funding from NYC DOE, and deny FRNs 2237088 and 2389503.

IV. Conclusion

Based on the review of the information and documentation provided by NYC DOE, USAC is rescinding the commitment for FY 2010 FRN 2239569 and will deny FY 2011

⁸¹ See *id.* at 4.

⁸² See *Macomb Order*, 22 FCC Rcd at 8773, ¶ 5 (providing that "Macomb ISD sought identical services from different providers to reduce the reliance of the school district on any single provider's network during an outage..."). See also August 2013 Response, at 3 ("NYCDOE did select two service providers to provide internet access, of which TW Telecom was one....The primary reason NYCDOE decided to use a load sharing solution was because it could not obtain sufficiently reliable, consistent service from one provider."); Request for Authorization Internet Service Provider Services, at 1 ("[h]aving two vendors/contracts will mitigate the risk that the DOE could lose complete Internet access due to a temporary vendor outage"); NYC DOE Request for Bid (RFB) No. B1389 Internet Services Provider (ISP) Services, Pre-proposal Conference PowerPoint Presentation, at 4, 10 (Dec. 15, 2009) (providing "NYC Department of Education (DOE) expects: [t]o select two vendors to bring Internet Services to the DOE. Awards will be for locations at 3 DOE Integrated Service Center (ISCs)" and that "DOE will be selecting two Vendors.").

⁸³ See *supra* n.24.

⁸⁴ See *Macomb Order*, at 8774, ¶ 8 ("Macomb ISD did not provide any evidence that the lowest-cost bidder was unable to provide the additional services requested.").

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December 2, 2013
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FRN 2239569 and FY 2012 FRN 2389503. As discussed above, NYC DOE and the respective service providers will be sent CAL and FCDL letters that rescind the commitment for FY 2010 FRN 2239569 and deny FY 2011 FRN 2237088 and FY 2012 FRN 2389503. If you wish to appeal these decisions, please refer to the instructions included in the FCDLs or CALs.

Sincerely,

Schools and Libraries Division
Universal Service Administrative Company

Enclosure